

April 28, 2015

Committee on the Review of the Supreme Court Rules Governing
Professional Conduct and the Practice of Law (“Committee”)
State Courts Building
1501 West Washington
Phoenix, Arizona 85007

Re: Petition to Amend Rule 31, Rules of the Supreme Court

Dear Members of the Committee:

The Arizona Association of REALTORS® (“AAR”) is concerned about the recent petition to amend Rule 31 of the Rules of the Supreme Court by eliminating the exemption for mediators “participating without compensation in a non-profit mediation program, a community based organization, or a professional association.” This amendment to Rule 31, if adopted, would effectively eliminate AAR’s mediation program and the positive benefits that mediation provides for REALTORS® and the public alike. AAR expressed similar concerns when the Rule was revised in 2003. *(See correspondence to Frances Johansen dated March 10, 2003; Alternative Dispute Resolution Advisory Committee Motion for Consideration; and Order dated June 30, 2003, attached hereto and incorporated by reference.)*

AAR is the largest professional trade association in the state and represents approximately 43,000 real estate brokers, agents, and other individuals involved in the real estate industry. AAR adopted its alternative dispute resolution programs over 21 years ago to ensure that disputes are resolved expeditiously, efficiently and economically. AAR offers mediation for: (1) commission disputes between REALTOR® members; (2) contractual disputes between REALTORS® and their clients; and (3) mediation of complaints alleging a violation of the REALTOR® Code of Ethics (except for complaints alleging a violation of the public trust).

AAR’s mediation programs are staffed by experienced volunteer REALTOR® mediation officers who undergo annual mediation training and are adept in dispute resolution techniques. At the end of a successful mediation, these REALTOR® mediation officers assist the parties in memorializing their agreement by filling out a pre-printed mediation agreement, which was drafted by an attorney. The pre-printed mediation agreement contains the majority of the settlement terms and the mediator only fills in the portion addressing what the parties agreed to in the mediation.¹

AAR’s mediation program has been widely adopted by the industry and enjoys a success rate of approximately 80% on average (in 2012 we had 23 mediations with 100% success). As I am sure you will agree, offering mediation has proven beneficial and allows a more efficient and cost

¹ A copy of the pre-printed mediation agreement is also attached for your reference.

Members of the Committee

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effective way for REALTORS® and the public to resolve their disputes prior to undertaking a lawsuit.

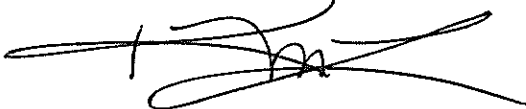
The proposed amendment of Rule 31(d)(25) will expose AAR's mediation officers to sanctions for the unauthorized practice of law if the mediation officers facilitate a written mediation agreement without either the supervision of an attorney or being a certified legal document preparer. This requirement is overly burdensome. Undoubtedly, most REALTORS® volunteering as mediators will not be willing to invest the time and resources necessary to become a certified legal document preparer. Additionally, ensuring an attorney is present at the end of each mediation (in the event the mediation settles) is cumbersome and would undermine the economic benefits offered by the mediation programs.

Consequently, if the proposed revision is adopted, it will effectively eliminate AAR's mediation program and the positive benefits that mediation provides for REALTORS® and the public alike. The reduction and/or elimination of REALTOR® mediation officers will adversely affect the court system. While it is understood that the Committee is trying to protect consumers who seek document assistance or legal information from those not admitted to practice law in Arizona, the implementation of the proposed amendment would negatively impact AAR and the public by hindering AAR's ability to offer mediation programs that have proved successful for over two decades.

Given the foregoing, AAR respectfully requests that the Committee and Supreme Court continue to exempt mediators "participating without compensation in a non-profit mediation program, a community based organization, or a professional association."

Sincerely,

K. Michelle Lind, Esq.

A handwritten signature in black ink, appearing to read 'K. Michelle Lind', with a stylized flourish at the end.

Chief Executive Officer
Arizona Association of REALTORS®

Enclosures

Michelle Lind

From: Michelle Lind
Sent: Monday, March 10, 2003 12:24 PM
To: 'Frances.Johansen@staff.azbar.org'
Cc: 'bob.dauber@asu.edu'
Subject: Rule 31, Rules of the Supreme Court of Arizona

Dear Fran:

As I indicated when we spoke recently, the Arizona Association of REALTORS® ("AAR") is concerned about the effect that the recent change to Rule 31, Rules of the Supreme Court of Arizona, will have on REALTOR® mediations. At your suggestion, I have also contracted Professor Bob Dauber, a member of the ADR Advisory Committee of the Arizona Supreme Court regarding these concerns.

As you may know, AAR is a professional trade association for real estate brokers, agents and other individuals involved in the real estate industry. AAR has over 30,000 members and is the largest trade association in Arizona. In the increasingly complex and dynamic environment in which REALTORS® function, it is inevitable that good faith disagreements will arise. To ensure that such disputes are resolved expeditiously, efficiently and economically, AAR offers mediation of commission disputes between REALTOR® members and mediation of certain contractual disputes between REALTORS® and their clients as an alternative to arbitration or litigation. AAR also has a program for the mediation of disputes between parties to its standard purchase contracts. Additionally, AAR plans to offer mediation of complaints alleging a violation of the REALTOR® Code of Ethics (except for complaints alleging a violation of the public trust).

AAR has a number of appointed volunteer mediation officers. These mediation officers are REALTORS® who have received mediation training and are experienced in dispute resolution techniques. If the parties agree to mediation, the mediation officer uses various techniques to encourage the parties to explore, understand, and appreciate each other's position. If the parties reach agreement, they are encouraged to put the agreement in writing and sign it.

AAR's mediation officers fall within the definition of a mediator as provided in Rule 31 (a) (5), which defines a mediator as:

[a]n impartial individual who is appointed by a court or governmental entity or engaged by disputants through written agreement, signed by all disputants, to mediate a dispute.

When we spoke on November 21, 2002 regarding AAR's mediation program, subsection 24 had not been added to the then proposed Rule. What prompted my inquiry was simply the definition of "mediator." My concern was that the then proposed Rule seemed ambiguous and could be interpreted to require that all mediators be lawyers. You explained during our conversation that the definition of "mediator" was necessary because of a problem with non-lawyers soliciting business posing as mediators, when they are actually engaging in the unauthorized practice of law. You indicated that the State Bar was attempting to clarify that a mediator is not an advocate and is not authorized to practice law. We discussed that a successful mediation generally results in an agreement, which should be reduced to writing. However, the rule seemed to attempt to prohibit that activity by defining the "practice of law" in pertinent part as:

3/10/2003

Providing legal advice or services to or for another by:

(1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity.

At that time, you indicated that the State Bar was working on a solution and was not concerned with legitimate mediation programs such as the one AAR offers its members.

However, AAR is now concerned that the subsequent addition of Rule 31(c) (24) ("Subsection 24") clearly exposes its mediation officers to sanctions for the unauthorized practice of law, which will adversely affect its mediation program and will prevent the positive benefits that mediation provides for REALTORS and the public alike. Subsection 24 states:

Nothing in these rules shall prohibit a mediator as defined in these rules from facilitating a mediation between parties, provided that a mediator who is not a member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified as a legal document preparer in compliance with the Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208.

AAR recognizes the goal of the Arizona State Bar is to protect consumers. However, AAR does not believe that its volunteer mediation officers should be required to become certified as "legal document preparers," nor does AAR believe that was intent of the drafters of Subsection 24. Given the foregoing, AAR would ask that the State Bar of Arizona support an amendment to Subsection 24 to clarify that a mediator is entitled to facilitate a written mediation agreement between the parties.

I would be happy to discuss this issue with you further.

Best Regards,

K. Michelle Lind

*K. Michelle Lind, Esq.
General Counsel
Arizona Association of REALTORS
255 East Osborn Road, Suite 200
Phoenix, Arizona 85012
Phone: 602-248-7787
Facsimile: 602-351-2472
michellelind@aaronline.com*

1 **IN THE SUPREME COURT OF ARIZONA**

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6 In re: Rule 31, Rules of the
7 Supreme Court of Arizona
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9 _____

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)
) **MOTION FOR**
) **RECONSIDERATION OF**
) **RULE 31(c)(24), RULES OF**
) **THE SUPREME COURT OF**
) **ARIZONA**
)

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11 The ADR Advisory Committee of the Arizona Supreme Court ,
12 pursuant to R. 28, Rules of the Supreme Court of Arizona, respectfully
13 requests the Court to reconsider the portion of Rule 31, Rules of the
14 Supreme Court of Arizona, that regulates the practice of mediation and the
15 credentialing of mediators in this state. Rule 31(a)(2)(D) defines
16 Amediator@ as Aan impartial individual who is appointed by a court or
17 government entity or engaged by disputants through written agreement,
18 signed by all disputants, to mediate a dispute.@ Under AExceptions,@ the
19 Rule provides,
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21 Nothing in these rules shall prohibit a mediator as defined in
22 these rules from facilitating a mediation between parties,
23 *provided that a mediator who is not a member of the state bar*
24 *and who prepares or provides legal documents for the parties*
25 *without the supervision of an attorney must be certified as a*
26 *legal document preparer in compliance with the Arizona*
27 *Code of Judicial Administration, Part 7, Chapter 2, Section 7-*
28 *208.*

27 R. 31(c)(24), Rules of the Supreme Court of Arizona.

1 The italicized portion of this subsection has several adverse consequences,
2 some of which may have been unintended by this Court:

- 3 1. The rule is likely to cause many community-based mediation
4 programs that rely on volunteer mediators to discontinue
5 operations; these programs include peer mediation programs
6 in the schools and neighborhood dispute resolution programs
7 administered by municipalities or non-profit organizations.
- 8 2. The rule will adversely impact mediation programs developed
9 by professional associations to mediate disputes between
10 association members, as well as disputes between members
11 and their clients.
- 12 3. The rule's coverage is ambiguous, and is likely to be
13 interpreted in a way that will effectively eliminate many
14 court-connected mediation programs, especially the widely-
15 used programs in the limited jurisdiction courts.
- 16 4. To the extent the Rule is intended to provide consumer
17 protection for users of mediation services, the Rule offers no
18 meaningful quality control and may be counterproductive.

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20 For these reasons, the Committee requests the Court to amend Rule
21 31(c)(24) to read: *Nothing in these rules shall prohibit a mediator as*
22 *defined in these rules from facilitating a mediation or preparing a written*
23 *mediation agreement.*

24 25 **The Rule's Impact on Community-Based Programs**

26 Over the past two decades, a multitude of programs have been
27 developed by organizations, schools and agencies in Arizona to assist
28 people in resolving interpersonal disputes without accessing the formal

1 court system. These programs, typically, train volunteers to mediate
2 specific types of disputes. Some of the programs serve as resources for
3 local law enforcement agencies to help neighbors resolve disputes without
4 initiating a formal court process, such as complaints about excessive dog
5 barking or property usage. Other programs train students to serve as Apeer
6 mediators@ for disputes among their fellow students. Because the
7 mediators in these programs often are engaged by the disputants through
8 written agreement, and they often help the parties memorialize any
9 resolution of the dispute through an enforceable written contract, they
10 apparently would be required to go through the certification process under
11 Rule 31, if the provision of subsection (c)(24) is not amended. Most of the
12 mediators in these programs are volunteers, thus, it is unlikely they would
13 be willing to invest the resources for the required certification. As a result,
14 the rule is likely to cause most of these programs to cease operations.

16 **The Rule's Impact on Mediation by Professional Associations**

17 The rule will adversely impact mediation programs implemented by
18 professional associations. For example, the Arizona Association of REALTORS®
19 (“AAR”) is a professional trade association for real estate brokers, agents and
20 other individuals involved in the real estate industry. AAR has over 30,000
21 members and is the largest trade association in Arizona. AAR offers voluntary
22 mediation for: (1) commission disputes between REALTOR® members; (2)
23 contractual disputes between REALTORS® and their clients; and (3) disputes
24 between parties to its standard purchase contracts. Although some of the
25 mediators involved in AAR’s programs are members of the State Bar, AAR has a
26 number of appointed volunteer mediation officers who have undergone mediation
27 training and are adept in dispute resolution techniques. At the end of a successful
28

1 mediation, these AAR mediation officers facilitate a written agreement between
2 the parties. Thus, Rule 31(c) (24) will expose AAR's mediation officers to
3 sanctions for the unauthorized practice of law, which will effectively eliminate
4 AAR's mediation program and the positive benefits that mediation provides for
5 members of the organization and the public alike. Other professional
6 organizations and consumer protection groups with similar mediation programs
7 likely will be affected in the same way.

9 **The Rule's Impact on Court-Connected ADR Programs**

10 Many court-connected mediation programs in the limited jurisdiction
11 courts, and some programs in the superior courts, also rely primarily on volunteers
12 to serve as neutrals. Typically, the court requires the volunteers to undergo a 40
13 hour training program in exchange for their agreement to serve as neutrals in a
14 specified number of cases. It is unclear whether Rule 31 regulates these
15 individuals. They seem to fall squarely within the definitional section, as they are
16 Appointed by a court.@ See R.31(a)(2)(D). At the conclusion of a mediation,
17 whether or not the case is resolved, they usually Aprepare[] or provide[] legal
18 documents for the parties without the supervision of an attorney,@ in that they
19 either help the parties draft their agreement or fill out the forms required by the
20 court when no agreement is reached. See R.31(c)(24). An argument can be made
21 that they are excluded from coverage under the rule by subsection (c)(22), which
22 provides, ANothing in these rules shall prohibit an officer or employee of a
23 governmental entity from performing the duties of his or her office or carrying out
24 the regular course of business of the governmental entity.@ However, if this
25 exclusion applies to the volunteer mediators because they are appointed by the
26 court, it is difficult to understand why the Rule specifically includes "individual[s]
27 appointed by the court" in its definition of a "mediator." See R.31(a)(2)(D).
28

1 The most likely interpretation of the Rule is that it covers volunteer
2 mediators in these court programs. As is true for the volunteers in the community-
3 based programs, presumably, most volunteers will not be willing to invest the
4 resources to go through the document-preparer certification process in order to
5 continue to volunteer their time for the benefit of the court. Because the funding
6 to pay neutrals is not available, the rule may result in the elimination of these
7 court-connected mediation programs. This, in turn, will impact the courts=
8 backlog of civil cases.

10 **The Rule Will Not Provide Quality Control For Consumers of Mediation** 11 **Services**

12 The explicit inclusion of Amediators@ within the coverage of Rule 31
13 suggests that the Court is concerned with protecting the public from individuals
14 who are holding themselves out as Amediators@ without possessing the
15 qualifications or expertise to provide adequate mediation services. To the extent
16 this problem exists, it is unclear how the requirement of certification as a
17 document-preparer will provide any meaningful level of consumer protection.
18 The risk that these individuals will know little or nothing about how to mediate
19 will remain unabated. To make matters worse, these same unqualified individuals,
20 if they choose to become certified document-preparers, will be free to tout
21 themselves as having credentials approved by the Supreme Court of Arizona that
22 allow them to mediate cases. Thus, the Rule may, in fact, be misleading to the
23 public and counterproductive to providing quality control for consumers of
24 mediation services.

27 **Recommendation**

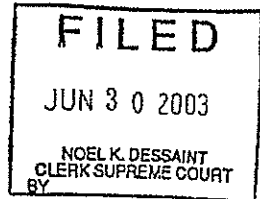
1 Because mediators typically help parties fill out court forms or memorialize
2 agreements reached during the mediation process, it is important for the Court to
3 be explicit about whether it intends to include mediators within the coverage of
4 Rule 31. The ADR Advisory Committee believes that this particular rule is not
5 an effective way to regulate the practice of mediation or protect the public from
6 unscrupulous, unqualified impostors, holding themselves out as mediators. As
7 written, the Rule will, in fact, be counterproductive, offering little to actually
8 protect the consumers of mediation services, while effectively eliminating a great
9 many beneficial mediation programs, both within and outside the court system.
10 Accordingly, the Committee requests the Court to amend Rule 31(c)(24) to read as
11 follows:

12 *"Nothing in these rules shall prohibit a mediator as defined in these*
13 *rules from facilitating a mediation or preparing a written mediation*
14 *agreement."*

15
16 DATED this _____ day of April, 2003.

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20 _____
21 Hon. Raymond W. Weaver, Jr.
22 Chair, ADR Advisory Committee
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SUPREME COURT OF ARIZONA



In the Matter of)
)
SUPREME COURT RULE 31) Arizona Supreme Court
AND NEW RULES 32, 76) No. R-02-0017
THROUGH 80, ARIZONA RULES)
OF THE SUPREME COURT)
) O R D E R
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The Alternative Dispute Resolution Advisory Committee filed a motion for reconsideration of the provision in Rule 31(c)(24), Rules of the Supreme Court, scheduled to take effect July 1, 2003. The rule requires a mediator who is not a member of the state bar and who prepares or provides legal documents for parties without the supervision of an attorney to be certified as a legal document preparer in compliance with the Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208. On June 3, 2003, the Court ordered that the motion for reconsideration be circulated for comment, with comments due on August 15, 2003. Therefore, pending the Court's determination of the motion for reconsideration,

IT IS ORDERED that implementation of Rule 31(c)(24) be stayed with respect to any mediator who is employed or appointed by a court or government entity and who is serving as a mediator at the direction of the court or government agency.

IT IS FURTHER ORDERED that implementation of Rule 31(c)(24) shall also be stayed with respect to any mediator who participates on a volunteer basis in an established mediation program affiliated

Supreme Court of Arizona
R-02-0017
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with a recognized community-based organization or a professional association.

This stay shall remain in effect until further order.

DATED this 30th day of June, 2003.



CHARLES E. JONES
Chief Justice

Who?

What?

When?

How?

Why?

ARIZONA ASSOCIATION OF REALTORS® MEDIATION AGREEMENT



ARIZONA
association of
REALTORS®
REAL SOLUTIONS. REALTOR® SUCCESS.

The pre-printed portion of this form has been drafted by the Arizona Association of REALTORS®. No modifications are permitted and any changes will result in unenforceable terms not available for consideration by Professional Standards policy and procedures.



Case #: _____

The undersigned are Parties in a Mediation Request/Ethics Complaint/Arbitration Request, Case MED-xxxxxx filed at AAR ("Professional Standards Case"). The Parties have participated in mediation and agree to the resolution set forth in this Mediation Agreement ("Agreement").

This Agreement shall settle all Claims asserted in or that could have been asserted by the Parties in the Professional Standards Case. "Claims" means all rights, claims, causes of action, actions, demands and damages of any kind, known or unknown, existing or arising in the future, pertaining to the subject matter hereof, by and/or against any Party. "Party or Parties" means the undersigned and anyone acting on their behalf.

The Parties agree as follows:

Each Party agrees to release and discharge all other Parties from any and all Claims, causes of action, demands for reimbursement, request for payment and/or Claims for relief, of any sort or description whatsoever, known or unknown, contingent or liquidated, past, present, or future, related in any way to the Professional Standards Case.

The Parties agree to dismiss the Professional Standards Case, each party to bear their own costs and attorneys' fees and/or waive, release and forgo the filing of any such Claims.

The Parties further agree to dismiss any and all complaints made to the Arizona State Department of Real Estate or other administrative agency against the other, and dismiss with prejudice any and all civil lawsuits against the other and/or waive, release and forgo the filing of any such Claims.

The Parties agree to hold AAR and the Mediator harmless and expressly waive any and all Claims against AAR and the Mediator arising out of the mediation and/or enforcement of this Agreement.

All Parties are bound by a covenant of good faith and fair dealing and agree to refrain from making any disparaging remarks regarding the other. The Parties acknowledge that there are no other agreements among them, written or oral, relating to the subject of this Agreement.

Each Party represents that in signing this Agreement, they have relied solely upon their own judgment, belief, and knowledge, and upon the advice and recommendation of legal counsel or acknowledge that they have had the opportunity to seek the advice of legal counsel.

This Agreement shall be construed according to Arizona law. If any action is brought to enforce this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees, legal expenses and court costs.

Upon execution of this Agreement the terms of this Agreement go into full force and effect and are binding on all Parties. This Agreement may be executed in any number of counterparts, all the counterparts shall be deemed to constitute one instrument, and each counterpart shall be deemed an original. This Agreement is dated to be effective as of the date of the last Party's signature.

Confidentiality:

The terms and conditions of this Agreement are absolutely confidential between the Parties and shall not be disclosed to anyone else, except as shall be necessary to enforce its terms, or as may be required by Court order. Any disclosure in violation of this section shall be deemed a material breach of this Agreement.

Non-Disparagement:

The Parties agree not to make any statements, verbal or written, in print or electronic format, or cause or encourage others to make any statements, verbal or written, in print or electronic format, that would reasonably be expected to defame, disparage or in any way criticize the personal or business reputation, practices, or conduct of the other party to this Agreement.

Parties:

Complainant(s):

Name (Print)	Signature	Date
Name (Print)	Signature	Date
Name (Print)	Signature	Date

Respondent(s):

Name (Print)	Signature	Date
Name (Print)	Signature	Date
Name (Print)	Signature	Date